

PUBLIC LAW BOARD NO. 6302

Martin H. Malin, Chairman & Neutral Member
T. W. Kreke, Employee Member
D. A. Ring, Carrier Member

On January 25, 2007, Carrier charged Claimant with allegedly failing to conduct a proper job briefing and failing to use a mechanical lifting device when carrying a battery down a hill, resulting in a personal injury. Carrier's letter offered Claimant the option of exercising his right to a hearing or waiving hearing and accepting discipline at UPGRADE Level 3. The letter was received by Claimant on January 26, 2007.

The Organization contends that Claimant completed the waiver form requesting a hearing and returned it to Carrier the same day he received it. The Organization maintains that Carrier never scheduled a formal investigation and Claimant assumed that he would not be disciplined. According to the Organization, Claimant first learned at an annual review of his record with his manager on October 8, 2007, that a Level 3 discipline had been entered on his record as a result of the January 25 charges. The instant claim was filed on October 19, 2007.

Carrier contends that the Organization has failed to prove that Claimant returned the form requesting a hearing. Consequently, in accordance with Rule 48(a), the proposed discipline was deemed accepted. Furthermore, in Carrier's view, under Rule 49(a), any claim was required to be filed within sixty days of Claimant's receipt of the charges on January 26, 2007. Consequently, Carrier urges, the claim is untimely and must be dismissed.

Rule 48(a) provides, in relevant part:

When employees are offered discipline pursuant to Paragraph (i), such employees will either accept or reject the offer within fifteen (15) calendar days from the date of receipt of the letter of charges. Discipline will be considered accepted if formal rejection is not received within fifteen (15) calendar days from the date of receipt of Carrier's letter. When discipline is rejected, Carrier will have no more than fifteen (15) calendar days from date of receipt of rejection in which to schedule and conduct the hearing and hearings held outside the thirty (30) day period referred to above will not be a violation of this rule.

The evidence concerning whether Claimant returned the letter and rejected the discipline is not particularly detailed. The Organization submitted a handwritten statement from Claimant stating, "I signed to reject Level 3 and requested an investigation. I never heard back." The statement does not expressly state that Claimant actually returned the investigation request. Carrier argues that if Claimant returned the investigation request and did not receive notice of a hearing being scheduled, Claimant would have inquired into the matter. We do not agree. Rule 48(a) clearly puts the burden on Carrier to schedule the investigation and Claimant could reasonably assume that if no investigation was scheduled within fifteen days of his request for hearing, he was free of the charges. However, as Carrier also points out, although it may reasonably be implied in Claimant's statement that he returned the hearing request, Claimant did not specify how he returned the investigation request, making it impossible for the Board to evaluate the reasonableness of Claimant's method of delivery.

Carrier submitted an e-mail statement from Claimant's Manager stating, "Mr. Gossage had the opportunity for a formal investigation however he did not return his 'Waiver of Hearing' in the time allowed," together with a hand-printed statement: "Steve McIntyre - 12-10-07 10:45 a.m./DID NOT RETURN SIGNED COPY OF ACCEPTANCE OR REJECTION, AT ALL!" It is unclear who wrote the hand-printed statement. In any event, neither the e-mail nor the hand-printed statement can literally be true as the Manager would have no personal knowledge of whether Claimant returned the hearing request. The most the Manager could attest to is that

Carrier never received the request. In this regard, the Manager's statement is as short on specifics as the Claimant's, as it fails to provide the basis for the assertion, such as the extent to which the Manager inquired into whether any correspondence from Claimant had been received.

In any event, we need not wade further into this battle of minutiae of the conflicting statements because one undisputed fact, in our view, resolves the claim. Discipline at UPGRADE Level 3 requires either a five-day suspension without pay or one day of training without pay. Carrier never imposed either on Claimant. In other words, Carrier never imposed Level 3 discipline; it simply entered a notation of a Level 3 discipline on Claimant's record. Since Claimant was never suspended for five days or required to undergo a day of training without pay, there was no reason for him to know that he had a Level 3 discipline on his record until informed of such by his Manager at the October 8 meeting. Thus, his claim filed on October 19 was timely.

Furthermore, since Carrier never actually imposed discipline at Level 3, it violated the Agreement for Carrier to note a Level 3 discipline on Claimant's record. Carrier's UPGRADE system is a program of progressive corrective discipline. Prior discipline is taken into account when deciding the level of future discipline. An employee's record showing prior discipline at Level 3 would indicate in case of a future infraction that a five-day suspension or a day or training without pay failed to correct the employee's behavior. But where no such discipline was actually imposed, such an assumption would be faulty. Because discipline was never actually assessed, the Level 3 notation on Claimant's record may not be maintained.

AWARD

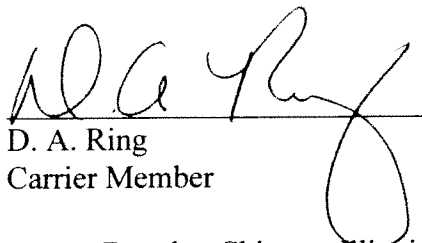
Claim sustained.

ORDER

The Board having determined that an award favorable to Claimant be issued, Carrier is ordered to implement the award within thirty days from the date two members affix their signatures hereto



Martin H. Malin, Chairman



D. A. Ring
Carrier Member



T. W. Kreke
Employee Member

June 23, 2009

Dated at Chicago, Illinois, June 23, 2009